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IN THE

82-1454

Supreme Court of the United States

No. _____

OCTOBER TERM, 1982

CLAUDE COWARD, NORMA FUNKHOUSER, VIOLA GOLDMAN, ANN HUFF, ROSEMARY HYDES, MARY LEE, VERNER BOOTH, BELVA CREECH, GENEVA WELLS, GEORGE HAMBAUGH, CAROLYN FOSTER, LOUIE WIMP, ANDY JOHNSON, RICHARD KERBERG, GEORGE JONES, BERNARD MILLER, JOE HYMAN, CHARLES LYNCH, JAMES REED, ARTHUR SAMPLES, ROBERTA LA PAILLE, MARVIN FUNKHOUSER, BETTY BROCK, MILLS VINCENT, HELEN CARROLL, ROSALIE BURKS, WILLIAM HIGHFILL, DAVE ROWE, SARA RAPP, KING BLAKELY, RAYMOND KENNEDY, OWEN WOLFE, ELBERT STEVENS, BARDFORD BULLOCK, ERNEST DENSFORD, WILLIAM HESSIG, ELMER KEITH, RALPH MORRISON, VERNIE GOLDMAN, GENEVA WITTINGHILL, JOHN BRUCE, KENNETH SINKHORN, HAROLD BROOKS, ALMA HOUSE, PAULINE HAMBAUGH, VELDA HOUSE AND WALTER BLAKELY,

Petitioners,

VS.

COLGATE-PALMOLIVE COMPANY, EMPLOYEES' RELATIONS COMMITTEE OF COLGATE-PALMOLIVE COMPANY, PLAN ADMINISTRATOR OF THE COLGATE-PALMOLIVE EMPLOYEES' RETIREMENT INCOME PLAN, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether or not hourly employees who are members of respondent Retirement Income Benefit Plan are entitled to all benefits of the plan which came into being during the time of their full participation in the plan which participation was never subsequently interrupted.

Whether or not the respondent Retirement Income Benefit Plan is a security within the meaning of the Securities Act of 1933, §17(a), 15 U.S.C.§77g(a) and the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission.

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Whether or not the respondent Retirement Income Benefit Plan is a security within the meaning of the Securities Act of 1933, §17(a), 15 U.S.C. §77g(a) and the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission.

IMPORTANCE OF QUESTIONS PRESENTED

The questions presented carry with them the novel question of the appropriate rights of hourly employees to retirement benefits, and the extent to which such fully accrued vested benefits are in fact protected by the terms of the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*, and the extent to which such Act is a jurisdictional basis for retirement plan members to secure a declaration of both their accrued retirement benefits and future retirement credits when they are placed in question.

The first question presented is significant because the answer to it is necessary in order to prevent arbitrary reduction of retirement benefits accrued to hourly employees by employers.

Petitioners seek review of this case by this Court because of their belief that it poses a significant question, the answer to which is vital in order that there continue to be an

orderly processing of cases like this through and by the trial courts of this land. (This Court's appellate Rule 17 1 A and C).

DECISIONS BELOW

On the 21st day of January, 1981, the district court granted summary judgment adverse to petitioners. (App. A1-8). There are fifty-three (53) petitioners herein. The district court granted summary judgment and dismissed the claims of thirty-nine (39) petitioners on the grounds that it did not have jurisdiction over the claims under the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*

The district court granted summary judgment against the remaining fourteen (14) petitioners on the grounds that *Bowe vs. Colgate*, 489 F.2d 896 (1973), and *Stevens, et al. vs. Colgate*, No. 75-1929 (7th Cir., 2-17-77)—both employment discrimination cases—both of which were decided before the rights asserted in the instant case came into existence, were a *res judicata* bar to these claims.

On August 16, 1982, the Court of Appeals affirmed the decision of the district court (App. A9-22), except that the Court of Appeals decided that the district court did have jurisdiction over the claims of the group of fourteen (14) petitioners under the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*

On November 10, 1982, the Court of Appeals denied rehearing in this case. (App. A23).

JURISDICTION

Petitioners brought this suit under the Employees' Retirement Income Security Act (ERISA), 29 U.S.C. §1132 *et. seq.*, seeking 1) a declaration of their entitlement to credit for accrued years of service in the respondent Retirement Income Benefit Plan, and 2) a declaration of

their future rights under the then current terms of said retirement income plan, by virtue of their being full and continuous participants in the retirement plan. All petitioners are long term employees with respondent. In some instances they have forty (40) years of service.

The district court decided that it did not have jurisdiction of this case under the Securities Act of 1933, §17(a), 15 U.S.C. §77g(a) and the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission. (App. A1-8). The Court of Appeals affirmed. (App. A9-22). The holding in this case is contrary to the ruling precedent of the Supreme Court.

STATEMENT OF THE FACTS

Petitioners are all full-time hourly employees of respondent's Jeffersonville, Indiana, facility. All petitioners are members of respondent's Retirement Income Benefit Plan. Likewise, all petitioners are members of the International Chemical Workers Union, Local 15. That union is the hourly employees' bargaining agent at the respondent's Jeffersonville, Indiana, plant.

Respondent's Retirement Income Benefit Plan was funded by financial contributions from both the employees and the employer from its inception on December 31, 1943, until December 31, 1976. After the latter date, direct financial contributions were not received from the employees.

In 1971, 1974 and 1977 the terms of the employees' benefits provided by the retirement plan were improved through collective bargaining between the International Chemical Workers Union, Local 15, and the respondent.

All petitioners were members of both respondent's retirement plan and the Chemical Workers Union at the time that the improved employees' retirement benefits

were negotiated in 1971, 1974 and 1977. Such membership in and participation in the retirement plan by petitioners have been continuous. The improved benefits were negotiated on behalf of all Colgate employees who were then members of the retirement plan.

Nevertheless, sometime after the third quarter of 1976, petitioners herein learned for the first time that the respondent was denying petitioners' rights to the improved employees' retirement benefits that were negotiated in 1971, 1974 and the benefits which became effective in 1977. The petitioners filed suit in the United States District Court for the Southern District of Indiana on the 30th day of September, 1977.

The respondent based its denial of said improved retirement income benefits to thirty-nine (39) of the petitioners on the grounds that they had previously (during the late 50's and early 60's), withdrawn from the plan. After the withdrawals, all petitioners re-enrolled in the plan during the 50's and 60's and were full participating members of the plan and the union (Chemical Workers, Local 15), at the time that the improved retirement benefits became effective, and at the time that the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*, became effective.

With respect to the remaining fourteen (14) petitioners, respondent contended that they were not entitled to the improved benefits on the theory that said petitioners had, in the past, suffered extended layoffs which resulted in the loss of their status as respondent's employees. This contention is not a bar to the claims of these petitioners, moreover, it is factually incorrect. Further, the fourteen (14) petitioners were all full-time employees of respondent and participants in the retirement plan and union at the time that the improved benefits because effective.

ARGUMENT REGARDING QUESTIONS PRESENTED

The Group of Thirty-Nine (39) Petitioners

The group of thirty-nine (39) petitioners deserve, under the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*, to have their entitlement to accrued retirement benefits decided, and to have their entitlement to future retirement benefits under the plan clarified. The trial court erred by flatly refusing to grant petitioners a hearing and state a declaratory judgment as to petitioners' rights in the future to benefits under the retirement plan. Instead, the trial court issued a summary judgment adverse to petitioners, thus denying these long term, and now older employees, retirement benefits for which they had worked for years.

The trial court reasoned that these petitioners had factually "waived" their right to these improved benefits long before such benefits came into existence, and long before petitioners could have known of the future existence of said improved retirement benefits. This, by the trial court's notion, was done as the petitioners signed a card during the 50's and 60's withdrawing from the plan briefly, and acknowledging that they understood that they had a right to then continue their participation in the plan. That acknowledgement could not exterminate retirement benefits which came into existence for the first time in the 70's. Moreover, an equitable contradiction is that persons who became respondent's employees for the first time after all petitioners had re-enrolled in the retirement plan, have been granted these improved retirement benefits which came into existence during the 1970's. Petitioners, who are all long term employees of respondent, are entitled to the improved retirement benefits. The trial court did have jurisdiction over these claims under ERISA, it erred by holding to the contrary, and the Court of Appeals erred by affirming.

Therefore, this Court should grant this petition for writ of certiorari.

Fourteen (14) Remaining Petitioners

With respect to the remaining fourteen (14) petitioners, the lower courts erred by holding their claims to have been barred by the doctrine of *res judicata* under *Bowe vs. Colgate*, 489 F.2d 896 (1973), and *Stevens, et al. vs. Colgate*, No. 75-1920 (7th Cir., 2-17-77). The determinations were made in both *Bowe* and *Stevens* before the claims involved in this case came into existence.

The issues raised by petitioners' Complaint were never litigated in *Bowe*, and the benefits claimed by petitioners came into existence only after *Bowe* was decided. Moreover, the trial court's decision is based upon the incorrect and un-tried assumed factual premise that, "these petitioners lost their status as employees by reason of a long term layoff." The assumption is inaccurate and should have been tested by trial. None of the fourteen (14) petitioners were ever on layoff status for a period of up to twenty-four (24) months. Respondent's official (Clayton O. McIntyre), stated as follows in his deposition:

> "Q. When is a break in employment considered to have occurred for layoff purposes?
>
> A. As I recall, its 24 months..."
> (Deposition of Clayton O. McIntyre, pgs. 83-84)

The writ of certiorari of these fourteen (14) petitioners should be granted.

Lastly, the holding in this case is contrary to the ruling precedent of the Supreme Court as to whether or not the retirement plan involved herein is a security so as to give the trial court jurisdiction over this case under the Securities Act of 1933 §17(a), 15 U.S.C. §77g(a) and the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission. The 7th Circuit has held in this case that the retirement plan involved is not a security. In the cases of *International Brotherhood of Teamsters v. Daniel*, 493 U.S.

551, 558 (1979), *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975), and *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975), it was held that the retirement plan such as the one involved in this case is a security within the meaning of the above cited statutes and rules.

CONCLUSION

Wherefore, for each of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

/s/ JOHN O. MOSS

JOHN O. MOSS,
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